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Ba Than v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05-249–08 OF 2014
AZIAH ALI, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
31 MAY 2016

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — Eyewitness saw deceased chased by two men and identified accused during identification parade — Whether there were inconsistencies between testimony from eyewitness and other witnesses — Whether identification parade by eyewitness must be corroborated with other testimonies — Whether eyewitness credible witness — Whether elements of charge of murder proven — Whether defence raised reasonable doubts — Penal Code s 302

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The appellant was charged for murder, an offence under s 302 of the Penal Code. One Nor Azlina ('PW5'), who heard a commotion, went out to have a look and saw the deceased being chased by two men. One wore black-coloured clothing and was holding a *parang* while the other wore white-coloured clothing and was holding a white object about one foot in length. The man holding the *parang* slashed the deceased twice on his chest near the neck. The man in white approached the deceased from behind and hit the deceased on his back with the long, white object. The deceased then fell to the ground. PW5 did not know these men. Five days later, PW5 attended an identification parade ('ID parade') where she identified the appellant as the man in white. Apart from the appellant, the police identified two other suspects, namely Khin Than Maung and Khin Tin Maung. According to another witness ('Htwe Hla'), he and the deceased were drinking alcohol when they were joined by the appellant. The appellant was dressed in white clothing. Khin Than Maung, on the other hand, wore a pair of dark-coloured knee length trousers and a black, round collared sleeveless t-shirt and a patterned *sarong*. The deceased was later seen arguing with Khin Than Maung and Khin Tin Maung. Khin Than Maung was holding a knife while Khin Tin Maung was holding a *parang*. He saw the appellant together with Khin Than Maung and Khin Tin Maung chased the deceased. When he later went to the place where the men had quarrelled, he saw the deceased lying on the ground covered in blood and groaning in pain. The deceased succumbed to his injuries. A post-mortem examination on the deceased revealed that the cause of the deceased's death was 'slash wound to the neck'. The trial judge accepted the identification of the appellant made by PW5. Based on the nature of the wounds suffered by the deceased and the weapons used, His Lordship found that the appellant together with the other two persons had the common intention to inflict bodily

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injury sufficient in the ordinary course of nature to cause death. Satisfied that the prosecution has established a prima facie case against the appellant, the latter was called to enter his defence. The appellant denied participating or being involved in the altercation with the deceased. The trial judge found that the appellant's defence was a mere denial, an afterthought and failed to raise any reasonable doubt in the prosecution case. The appellant was accordingly found guilty and convicted for the offence and sentenced to death. Hence, the present appeal. The appellant submitted that the evidence of PW5 with regard to the conduct of the identification parade was inconsistent with the evidence of the officer who had conducted the said parade ('PW13'). PW5 had said that three identification parades were conducted. On the other hand, PW13 had stated that two parades were conducted. In view of the inconsistencies, the appellant submitted that there was doubt as to the identity of the appellant and since PW5 was the sole eyewitness, her evidence on the identity of the appellant ought to be corroborated.

Held, dismissing the appeal:

(1) The trial judge had considered her testimony and found that PW5 was a credible witness. It was quite probable that PW5 did not see the third person involved. The prosecution had adduced sufficient evidence to satisfy the requirements of s 32 of the Evidence Act 1950. The statements show that both Htwe Hla and Tun Khaw Hling were present when the quarrel between the deceased and Khin Than Maung and Khin Tin Maung started and they had seen the deceased being chased by the appellant, Khin Than Maung and Khin Tin Maung. The statements contained the description of the clothes worn by the deceased, the appellant, Khin Than Maung and Khin Tin Maung which were consistent with the description given by PW5. These statements hence supported the testimony of PW5 (see paras 23–24).

(2) The mens rea element for the offence of murder could be plainly inferred from the weapons used and the number of injuries and the nature of the injuries inflicted upon the deceased. Where the weapons used were deadly weapons and where the person killed was struck with more than one blow, the only reasonable conclusion that could be made was that those blows were inflicted with the intention to cause bodily injury sufficient in the ordinary course of nature to cause death (see para 29).

(3) According to PW5, the appellant was approximately 12 ft behind the deceased when the deceased was slashed on the neck with the *parang*. After the deceased was slashed, the appellant then approached the deceased from the back and had struck the deceased with the object that he had in his hand. He had therefore actively participated in the attack on the deceased and was thus as blameworthy as the man who had intentionally inflicted the fatal blow on the deceased (see para 32).

(4) The appellant's defence of denial had failed to raise any reasonable doubt in the prosecution's case and the prosecution has proved its case against the appellant beyond reasonable doubt (see para 33).

[Bahasa Malaysia summary

Perayu dipertuduh membunuh, satu kesalahan di bawah s 302 Kanun Keseksaan. Nor Azlina ('PW5') yang terdengar riuh rendah, keluar untuk melihat dan ternampak si mati dikejar dua orang lelaki. Seorang memakai baju hitam dan memegang parang manakala seorang lagi memakai baju putih dan memegang objek putih sepanjang satu kaki. Lelaki yang memegang parang mengelar si mati dua kali pada dada dan dekat dengan lehernya. Lelaki yang berpakaian putih mendekati si mati dari belakang dan memukul belakang si mati dengan objek panjang berwarna putih tersebut. Si mati rebah ke tanah. PW5 tidak mengenali lelaki-lelaki ini. Lima hari kemudian PW5 menghadiri satu kawad cam di mana dia mengecam perayu sebagai lelaki berpakaian putih. Selain perayu, polis mengenal pasti dua lagi suspek iaitu Khin Than Maung dan Khin Tin Maung. Menurut seorang lagi saksi ('Htwe Hla'), dia dan si mati sedang minum alkohol semasa mereka disertai perayu. Perayu berbaju serba putih. Khin Than Maung, sebaliknya, memakai sepasang seluar berwarna gelap dan t-shirt berkolar bulat tidak berlengan dan kain sarung bercorak. Si mati kemudian dilihat bergaduh dengan Khin Than Maung dan Khin Tin Maung. Khin Than Maung memegang pisau manakala Khin Tin Maung memegang parang. Dia melihat perayu bersama-sama dengan Khin Than Maung dan Khin Tin Maung mengejar si mati. Sekembalinya ke tempat mereka bergaduh, dia melihat si mati terbaring di atas tanah berlumuran darah dan mengerang kesakitan. Si mati meninggal dunia akibat kecederaannya. Satu pemeriksaan bedah siasat mendedahkan bahawa punca kematian si mati adalah luka akibat kelaran pada leher. Hakim bicara menerima pengecaman perayu yang dibuat oleh PW5. Berdasarkan sifat luka yang dialami si mati dan senjata-senjata yang digunakan, beliau memutuskan bahawa perayu bersama-sama dengan dua orang lagi mempunyai niat bersama untuk menyebabkan kecederaan yang secara semulajadinya boleh menyebabkan kematian. Berpuas hati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap perayu, perayu dipanggil membela diri. Perayu menafikan berperanan atau terlibat dalam pergaduhan dengan si mati. Hakim bicara memutuskan bahawa pembelaan perayu adalah penafian semata-mata, satu fikiran semula dan gagal membangkitkan keraguan munasabah terhadap kes pihak pendakwaan. Perayu didapati bersalah dan disabitkan atas kesalahan serta dijatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu menghujahkan bahawa keterangan PW5 tentang cara kawad cam dijalankan tidak konsisten dengan keterangan pegawai yang menjalankan kawad tersebut ('PW13'). PW5 mengatakan bahawa tiga kawad cam dijalankan. Sebaliknya, PW13 menyatakan bahawa dua kawad dijalankan. Berdasarkan ketidakselarasan ini, perayu menghujahkan bahawa terdapat keraguan pada identiti perayu dan

memandangkan PW5 satu-satunya saksi mata, keterangannya tentang identiti perayu wajar disokong.

Diputuskan, menolak rayuan:

(1) Hakim bicara mempertimbangkan keterangan PW5 dan mendapati bahawa dia adalah saksi yang boleh dipercayai. Adalah berkemungkinan bahawa PW5 tidak melihat orang ketiga yang terlibat. Pihak pendakwaan telah mengemukakan keterangan yang cukup untuk memenuhi keperluan s 32 Akta Keterangan 1950. Pernyataan-pernyataan menunjukkan bahawa kedua-dua Htwe Hla dan Tun Khaw Hling ada semasa perkelahian antara si mati dengan Khin Than Maung dan Khin Tin Maung bermula dan mereka melihat si mati dikejar oleh perayu, Khin Than Maung dan Khin Tin Maung. Pernyataan-pernyataan tersebut mengandungi gambaran pakaian yang dipakai si mati, perayu, Khin Than Maung dan Khin Tin Maung yang selaras dengan gambaran yang diberi oleh PW5. Oleh itu, pernyataan-pernyataan ini disokong oleh keterangan PW5 (lihat perenggan 23–24).

(2) Elemen mens rea bagi kesalahan membunuh boleh disimpulkan daripada senjata-senjata yang digunakan dan jumlah kecederaan dan sifat kecederaan pada si mati. Jika senjata yang digunakan boleh membunuh dan orang yang terbunuh dikenakan dengan lebih daripada satu tikaman, satu-satunya kesimpulan munasabah yang boleh dibuat adalah tikaman dikenakan dengan niat menyebabkan kecederaan pada tubuh badan yang secara semulajadinya cukup untuk menyebabkan kematian (lihat perenggan 29).

(3) Menurut PW5, perayu berada lebih kurang 12 kaki di belakang si mati semasa si mati mengelar lehernya dengan parang. Selepas si mati dikelar, perayu mendekati si mati dari belakang dan memukul si mati dengan objek dalam tangannya. Dia kemudiannya mengambil bahagian secara aktif dalam serangan terhadap si mati dan kemudiannya dituduh sebagai lelaki yang secara sengaja menikam si mati hingga maut (lihat perenggan 32).

(4) Pembelaan penafian oleh perayu gagal membangkitkan apa-apa keraguan munasabah dalam kes pendakwaan dan pihak pendakwaan berjaya membuktikan kesnya terhadap perayu melampaui keraguan munasabah (lihat perenggan 33).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

PP v Jitweer Singh a/l Ojagar Singh [2014] 6 MLJ 222; [2014] 1 CLJ 433, FC (refd)

Tan Kim Hoo v PP & another appeal [2007] 6 CLJ 557, CA (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 s 32
Penal Code ss 34, 300(c)

Appeal from: Criminal Trial No 45B-8–11 of 2012 (High Court, Kuantan)

Mohd Ashri bin Rais (Mohd Ashri Rais & Co) for the appellant.
Mangairkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA:

INTRODUCTION

[1] The appellant, a Myanmar national, was charged with the offence of murder as follows:

> Bahawa kamu bersama-sama dua orang lagi yang masih bebas bagi mencapai niat bersama pada 20 November 2011 antara jam 2.00 petang hingga 2.10 petang di Jalan Ladang Kelapa Sawit, Jalan Kampung Kasing Pianggu, Endau di dalam Daerah Rompin, di dalam Negeri Pahang telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Soe Myint, dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[2] At the conclusion of the trial, the trial judge found the appellant guilty as charged. He was convicted and sentenced to death by the High Court. Hence the appeal to this court. We had dismissed his appeal and affirmed the conviction and sentence. We now give our reasons.

PROSECUTION CASE

[3] Briefly, the prosecution case shows that on 20 November 2011 at about 2pm, Nor Azlina bt Abdul Rahim ('PW5') was in the kitchen of her sister's house when she heard a commotion. She went out to have a look and she saw a man who was not wearing any shirt (identified as the deceased) being chased by two men. One of the men wore black coloured clothing and was holding a machete (*parang*). The other man wore white coloured clothing and was holding a white object about one foot in length. The men were about 40 ft away

from PW5 and they were running in the direction of PW5. When the deceased stopped, PW5 saw the man who was holding the machete slashed the deceased twice on his chest near the neck. When the deceased was slashed, he was facing in the direction of PW5 while the man who slashed him had his back towards PW5. At that time, the man in white was about 12 ft away. Then PW5 saw the man in white approached the deceased from behind and hit the deceased on his back with the long, white object. The deceased then fell to the ground. The man in white then turned around and threw away the long, white object. PW5 did not know these men. According to her, the incident happened within a short time but she could see the three persons clearly. PW5 then went back into the house. Five days later, on 25 November 2011 PW5 attended an identification parade (ID parade) where she identified the appellant as the man who was in white.

[4] Fadzil bin Aw Tah ('PW2'), a grass cutter, was cutting grass when he saw two men running about 15 ft away behind him. Then he heard someone screaming. He turned to look and he saw a man fell but he continued with his work. Then he saw a man without any shirt on the ground with blood on his body. PW2 then called the emergency number '999' and he then went to the main road. After about 40 minutes a police patrol car arrived.

[5] L/Cpl Banyong ak Sering ('PW1') took the call from PW2. PW1 then informed the investigating officer, Insp Mohd Fairus bin Ahmad ('PW8') who then proceeded to the scene. At the scene, he met L/Cpl Mazelan bin Morat ('PW4'). PW4 had been informed by a male Malay that there was a fight among some Myanmars. When PW4 arrived at the scene, he saw the deceased lying on his back on the ground and there was a lot of blood. According to PW8, the deceased was wearing only faded dark blue jeans (exh P26) without a shirt. PW8 then informed ASP Mohd Razali bin Abd Razak ('PW14') who then contacted Insp Zulaikha bt Dol @ Abdul Mauluk ('PW9'), an investigating officer attached to the Forensic Division, Criminal Investigation Department at the Pahang Police headquarters. PW9 proceeded to the scene together with four other police personnel. At the scene PW9 and her team recovered exhibits which she then handed over to PW14 (exh P82). No knife was recovered at the scene.

[6] A post-mortem examination on the deceased was conducted by Dr Sri Marni bt Zainal Abidin ('PW6') who prepared a post-mortem report (exh P13) which showed that the deceased suffered, amongst others, a slash wound to the left side of the nape of the neck, eight incised wounds and five stab wounds to various parts of the body. The cause of death was 'slash wound to the neck'. In respect of this particular injury, PW5 testified, amongst others, as follows (pp 75–79 appeal record):

Luka pertama ialah luka hirisan berukuran 27x3.5 cm. Dibahagian leher bermula dari bahagian belakang leher disebelah kiri dan terus sambung ke depan leher sehingga akhirnya sedikit dibahagian atas kanan dada

Luka pertama ini telah menyebabkan kecederaan dibahagian otot dileher dan bahagian atasan dada sedikit, tisu-tisu di kawasan yang sama dan juga tulang rusuk sebelah kiri yang pertama dan tulang sternum. Salur darah vena disebelah kiri (*left inter jugular vein*) telah dipotong sepenuhnya dan disebabkan hirisan pertama tadi.

Oleh kerana luka-luka yang didapati luka-luka hirisan samada slash wound atau incised wound dan luka tikaman maka saya berpendapat ia disebabkan objek yang tajam. Sekiranya parang mempunyai mata yang tajam boleh menyebabkan luka-luka ini. Sebab kematian adalah disebabkan luka hirisan di leher atau slash wound of the neck.

Kecederaan pertama iaitu luka dibahagian leher menyebabkan putusnya salur darah vena ialah jenis yang fatal. Luka-luka yang lain tidak fatal in nature.

Kecederaan yang pertama adalah cukup pada lazimnya menyebabkan kematian.

[7] In cross-examination, PW6 answered as follows (pp 94–95 appeal record):

Q: Kecederaan pertama yang fatal dan menyebabkan kematian.

A: Ya.

Q: Setujukah kecederaan pertama akibat serangan daripada bahagian hadapan.

A: Setuju tapi bergantung pada keadaan.

Q: Jika simati diserang daripada bahagian hadapan leher berlaku kecederaan pertama.

A: Ya.

Q: Kecederaan ini dalam keadaan rapat dengan simati.

A: Ya.

Q: Kesan tetakan adalah kuat.

A: Ya.

Q: Kesan tetakan akibat senjata yang berat.

A: Ya, boleh.

Q: Kecederaan pertama boleh menyebabkan mangsa jatuh terlentang.

A: Kemungkinan juga.

[8] According to PW14, investigations showed that there were more than one suspect involved. Apart from the appellant, the police identified two other suspects by the name of Khin Than Maung and Khin Tin Maung. On 20

November 2011, pursuant to information received, Insp Ridhuan bin Abdul Razak ('PW10') and a police party went to an unnumbered house at Kampung Sarang Tiong, Tanjong Gemok, Rompin and arrested the appellant and two others by the name of Htwe Hla and Khaw Myant (exh P83). PW10 testified that there was a scuffle because the appellant had resisted arrest and had attempted to run away. The persons arrested were then handed over to PW14.

[9] The police recorded statements under s 112 of the Criminal Procedure Code from Htwe Hla (exh P94) and another person by the name of Tun Kyaw Hling (exh P95). In respect of these two statements, evidence was adduced by the prosecution that the two other suspects and these witnesses could not be located for the trial despite the police seeking the assistance of INTERPOL Malaysia, the Pahang Immigration Department, UNHCR and the Ministry of Foreign Affairs (exhs P92 and P93). The trial judge overruled the objections by the learned counsel and allowed the statements to be admitted as evidence under s 32 of the Evidence Act 1950.

[10] Briefly, the statement recorded from Htwe Hla (exh P94) shows that he and the deceased, who was his brother-in-law, together with another man by the name of Khin Shwe, stayed at an unnumbered house in Kg Kasing, Tg Gemok, Rompin, Pahang. On the day of the incident he was chatting with his friend, Tun Kyaw Hling (who was also known as 'Serado') in front of Serado's house when he saw five men who he identified as Khin Than Maung, Khin Tin Maung, Hla Win, Thein Aung Shwe and the deceased drinking alcohol under a tree approximately 20 metres away. Then they were joined by the appellant. He had known the appellant for approximately two years, Khin Than Maung and Khin Tin Maung for about five months and Hla Win for approximately two years. He was not familiar with Thein Aung Shwe.

[11] The appellant was dressed in a predominantly white coloured short sleeved shirt and knee length trousers. Khin Than Maung only wore a pair of dark coloured knee length trousers. Khin Tin Maung wore a black, round collared sleeveless t-shirt and a patterned *sarung*. Hla Win wore a white singlet and *sarung* while Thein Aung Shwe wore a black and white shirt with cream coloured jeans. The deceased only wore blue jeans without any shirt.

[12] He then saw the six men quarrelling. Together with Serado, he approached the men to break up the quarrel. He saw the deceased arguing with Khin Than Maung and Khin Tin Maung. Khin Than Maung was holding a knife. Khin Tin Maung was holding a machete about 2 ft long. The appellant was holding a piece of wood approximately 2 ft long. As he and Serado were trying to break up the quarrel, he saw Khin Than Maung tried to stab the deceased with the knife but the deceased managed to evade and ran away. He and Serado tried to stop Khin Than Maung, Khin Tin Maung and the

appellant from chasing the deceased but Khin Than Maung scolded them and pointed the knife at them which caused them to feel frightened. They ran away and hid in some undergrowth nearby. He saw the appellant together with Khin Than Maung and Khin Tin Maung chased the deceased. Later when he and Serado went to the place where the men had quarrelled, he saw the deceased lying on the ground covered in blood and groaning in pain. The deceased's chest was covered in blood. He saw a wound on the left side of the deceased's neck extending to the left side of his chest and his left ear was almost severed. Then the deceased stopped moving and he suspected that the deceased had died. He did not see how the deceased was attacked or who had hit the deceased. He also did not know where the perpetrators had run off to. Later the same evening, he was arrested. On 22 November 2011 at the hospital, he identified the deceased's body.

[13] The statement recorded from Tun Khaw Hling (exh P95) shows that he had known the deceased for about ten years and the deceased was his friend. He had known the appellant for approximately two years and both Khin Than Maung and Khin Tin Maung for about six months. Essentially the facts narrated in this statement are similar to the facts as narrated in exh P94.

FINDINGS OF THE TRIAL JUDGE

[14] The trial judge accepted the evidence of PW2 and the identification of the appellant made by PW5. The trial judge accepted the evidence of PW5 who testified that after the deceased was slashed from the front by the person wearing black, the appellant had approached the deceased from behind and had hit the deceased's back with a long, white object. His Lordship also found that there was no evidence to show that the identification of the appellant by PW5 had been compromised by the police as suggested by the learned counsel.

[15] In respect of exhs P94 and P95, the trial judge had reminded himself that these two statements were untested by cross examination and did not have the weight of sworn testimony (*Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222; [2014] 1 CLJ 433). His Lordship evaluated the facts stated in the statements against the facts established through the prosecution witnesses. His Lordship found that both statements are consistent on the fact that the deceased was chased by the appellant and the two others who are still at large and that these statements supported the evidence of PW5 in respect of the identity of the appellant. His Lordship also accepted the evidence of the pathologist PW6 in respect of the wounds suffered by the deceased.

[16] Based on the nature of the wounds suffered by the deceased and the weapons used, His Lordship found that the appellant together with the other

two persons had the common intention to inflict bodily injury sufficient in the ordinary course of nature to cause death. Therefore the prosecution has established a prima facie case of murder under limb (c) of s 300 of the Penal Code read with s 34 of the same Code against the appellant. Consequently the appellant was called to enter his defence.

DEFENCE CASE

[17] The appellant gave sworn evidence. He was the sole witness for the defence. According to the appellant, Khin Than Maung is his brother. On the day of the incident, he had gone to his brother's house. Three friends of his brother were also present. Then he saw the deceased run out of his brother's house chased by two of his brother's friends. He then ran after them to find out what had happened. Behind him, he saw that his brother was also running holding a knife. One friend of his brother was holding a machete and another was holding something that looked like a piece of wood. The appellant was not carrying anything.

[18] According to the appellant, from afar he could see the deceased sitting on the ground screaming as he was attacked by his brother's friends. Feeling afraid, the appellant stated that he returned to his brother's house. He agreed that he was arrested on the evening of the day of incident. The gist of the appellant's defence was that he had not participated nor was he involved in the altercation with the deceased.

FINDING OF THE TRIAL JUDGE

[19] The trial judge found that the defence is a mere denial and an afterthought. His Lordship found that the appellant's contention that he was not holding anything at the material time is inconsistent with the stand taken by the defence in the cross-examination of PW5 when it was put to PW5 that the appellant was holding a piece of bamboo (*buluh*). In this regard, we reproduce below the relevant part of the cross-examination of PW5 as follows (p 71 appeal record):

Q: Setuju lelaki yang pakai baju hitam dan putih menggunakan buluh.

A: Tidak setuju.

[20] Having evaluated the defence, the trial judge found that the evidence of the appellant is inconsistent and not credible and the purpose of appellant's defence is merely to distance himself from the deceased's murder. The trial judge found that the defence has failed to raise any reasonable doubt in the prosecution case and the prosecution has proved its case beyond reasonable doubt. The appellant was accordingly found guilty and convicted and sentenced to death.

THE APPEAL

[21] Before us, the learned counsel raised issues with regard to the charge and the identity of the appellant. In respect of the charge, it was submitted that the appellant was charged with committing murder together with two other persons. According to learned counsel, the charge must have been framed based on the statements recorded from Htwe Hla and Tun Khaw Hling who had stated that the deceased was chased by the appellant and two other men. However, according to PW5 the deceased was attacked by the appellant and one other man.

[22] In respect of the identification parade, it was submitted that the evidence of PW5 with regard to the conduct of the identification parade is inconsistent with the evidence of Insp Mohd Nizar bin Abd Aziz ('PW13'), the officer who had conducted the said parade. PW5 had said that three identification parades were conducted. On the other hand, PW13 had stated that two parades were conducted. In view of the inconsistencies, learned counsel submitted that there is doubt as to the identity of the appellant and since PW5 was the sole eyewitness, her evidence on the identity of the appellant ought to be corroborated.

OUR DECISION

[23] On the issue of the charge, we have perused the evidence of PW5. The trial judge had considered her testimony and found that PW5 is a credible witness. We find no reason to disagree with the trial judge. The evidence show that unlike Htwe Hla and Tun Khaw Hling, PW5 did not see how the incident started. She had seen the deceased being chased and attacked by two men. Then she went back into the house. Having considered the circumstances, we are of the view that it is quite probable that PW5 did not see the third person involved.

[24] In respect of the two statements, we agree with the trial judge that the prosecution has adduced sufficient evidence to satisfy the requirements of s 32 of the Evidence Act 1950. The statements show that both Htwe Hla and Tun Khaw Hling were present when the quarrel between the deceased and Khin Than Maung and Khin Tin Maung started and they had seen the deceased being chased by the appellant, Khin Than Maung and Khin Tin Maung. The statements contain the description of the clothes worn by the deceased, the appellant, Khin Than Maung and Khin Tin Maung which is consistent with the description given by PW5. These statements hence supports the testimony of PW5.

[25] The fact established through the pathologist PW6 is that PW6 had

found a piece of thin, sharp metal (*logam*) (exh P18) embedded in the deceased's back. In cross-examination, PW6 agreed with learned counsel that exh P18 came from a knife and injury No 14 (exh P8(10)) on the deceased's back could have been inflicted with a sharp weapon. The statements show that the appellant was armed with a piece of wood or bamboo. Khin Thin Maung was armed with a machete and Khin Than Maung was armed with a knife. Therefore the knife wounds found on the deceased could only be attributed to Khin Than Maung. In our view, the independent evidence of the pathologist lends credence to and supports the statements that three persons were involved in attacking the deceased as stated in the charge.

[26] On the issue of the identification parade which was held about five days after the incident, PW5 had stated that three identification parades were conducted. In her testimony, PW5 had stated as follows (p 68 appeal record):

> Kawad cam dibuat dua kali dalam cermin gelap dan sekali lagi dengan sentuhan. Pada kali pertama saya dapat cam lelaki yang pakai baju putih
>
> Kedudukan lelaki yang pakai baju putih dalam kawad cam pertama adalah diantara peserta no. 5 dan no. 6. Kedudukan lelaki yang pakai baju putih pada kawad cam kali kedua adalah diantara peserta-peserta no. 9 dan no. 10.
>
> Kawad cam kali ketiga saya ada menyentuh lelaki yang pakai baju putih.

[27] The identification parade report (exh P90) that was prepared by PW13 shows that two parades were conducted. There is no mention of the third identification parade. But PW13 was not cross-examined on this issue or referred to the evidence of PW5 though exh P90 was referred to during cross-examination. This omission by the defence has deprived the prosecution and PW13 of the opportunity to explain the number of parades conducted. In any event, we are of the view that this issue had not substantially compromised the identification of the appellant by PW5.

[28] PW5 had said that although the incident happened within a short space of time, she could see what happened clearly. Notwithstanding the fact that the appellant was unknown to her, in cross-examination, PW5 could describe the appellant as follows:

> Q: Nampak dengan jelas ketiga-tiga lelaki ini.
>
> A: Ya jelas.
>
> Q: Seluar apa yang dipakai oleh lelaki yang pakai baju putih.
>
> A: Seluar pendek dan warna tak pasti. Tapi baju warna putih.
>
> Q: Selain baju putih apa lagi yang dicamkan.
>
> A: Muka dan rambut. Rambutnya tegak-tegak sikit dan tak berapa panjang dan warna hitam. Masa kejadian itu muka lelaki yang pakai baju putih itu saya cam.

The trial judge had found that PW5 was firm in her identification of the appellant and had accepted her reasons why she was able to identify the appellant. We have no reason to disagree with the trial judge. On the evidence, we find that the quality of her identification evidence is good and there is no issue of mistaken identification (see *Tan Kim Hoo v Public Prosecutor & another appeal* [2007] 6 CLJ 557).

[29] The mens rea element for the offence of murder can be plainly inferred from the weapons used and the number of injuries and the nature of the injuries inflicted upon the deceased. Where the weapons used were deadly weapons and where the person killed was struck with more than one blow, the only reasonable conclusion that can be made is that those blows were inflicted with the intention to cause bodily injury sufficient in the ordinary course of nature to cause death.

[30] In the present case, PW6 had testified that the deceased had suffered a total of 15 injuries and the slash wound on the deceased's neck which measured 27 x 3.5 cm was inflicted with force. Thus the only reasonable inference that can be made is that the injury that was inflicted upon the deceased's neck, which is a vital part of the body, was inflicted with the intention to cause bodily injury sufficient in the ordinary course of nature to cause death.

[31] On the issue of common intention, it is a well established principle of law that a pre-concert or preplanning may develop on the spot or during the course of the commission of the offence. The appellant was clearly aware that Khin Tin Maung was armed with a machete and Khin Than Maung was armed with a knife. These are undoubtedly dangerous weapons to use and the appellant ought to have known the probable result of using such weapons to assault the deceased.

[32] We find that the prosecution has established and proved the ingredients of s 34. According to PW5, the appellant was approximately 12 ft behind the deceased when the deceased was slashed on the neck with the machete. After the deceased was slashed, the appellant then approached the deceased from the back and had struck the deceased with the object that he had in his hand. He had therefore actively participated in the attack on the deceased and is thus as blameworthy as the man who had intentionally inflicted the fatal blow on the deceased.

[33] We agree with the trial judge that the appellant's defence of denial had failed to raise any reasonable doubt in the prosecution's case and the prosecution has proved its case against the appellant beyond reasonable doubt.

[34] For the reasons stated above, we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed.

Reported by Afiq Mohamad